SUPREME COURT, U.S.
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No. 94-1653

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

THE AMERICAN LIBRARY ASSOCIATION, et al.
Petitioners,

v.

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES; DEPARTMENT OF JUSTICE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF AMICI CURIAE NATIONAL FAMILY LEGAL FOUNDATION, FOCUS ON THE FAMILY AND FAMILY RESEARCH COUNCIL, INC. IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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CONSENT OF THE PARTIES

Attorneys for Petitioners and Respondent have consented to the filing of an amici curiae brief by National Family Legal Foundation, Focus on the Family, and Family Research Council, Inc. (Appendix A).

INTEREST OF AMICI CURIAE

National Family Legal Foundation ("NFLF") is a non-profit legal organization founded in 1990. The Foundation exists to assist public officials in the enforcement and drafting of constitutional obscenity and child pornography laws. NFLF provides public information on legal and social issues related to pornography, and on sexual exploitation and victimization by child pornographers. The Foundation has a legal staff of attorneys practicing exclusively in the First Amendment/pornography area.

NFLF's former Executive Director, Alan E. Sears, was also the Executive Director of the Attorney General's Commission on Pornography. Mr. Sears and the Honorable Edwin Meese, who as Attorney General issued the commission's Final Report, now serve on NFLF's Board of Directors.

The recordkeeping provisions of the Child Protection Restoration and Penalties Enhancement Act were the direct result of a key recommendation of the Attorney General's Commission. Mr. Sears was involved in drafting the legislation and submitted comments for NFLF and other groups on the Act's accompanying regulations. NFLF attorney Len Munsil has written an amicus brief at every level of proceedings beginning with the U.S. District Court case.

Focus on the Family is a Christian, non-profit organization committed to strengthening the emotional, psychological and spiritual health of children and their

families in the United States and throughout the world. Focus President Dr. James C. Dobson, a renowned child psychologist, served on the Attorney General's Commission on Pornography in 1986.

Focus has produced two major videos, "A Winnable War" and "Fatal Addiction" and assisted in one book *Pornography: A Human Tragedy* which directly discusses the harms of pornography to children, men, women and families in America. The videos and book have been seen and read by thousands of concerned citizens nationwide. Focus' daily radio broadcasts dealing with family concerns and interests are heard by more than one million people daily over 1,400 stations. Its monthly magazine has a circulation of 1.85 million. Focus regularly receives letters and telephone calls from and counsels with families who have children devastated by pornography, molestation and abuse.

Focus on the Family works to preserve and protect

the family, and thus has particular knowledge about the impact of child pornography that will be helpful to the Court in this case.

Family Research Council, Inc. is a voice for the pro-family movement in Washington, D.C. and provides policy analysis, legislative assistance and research for pro-family organizations. It also seeks to educate legislators on issues which affect American families. Its research, publications and films on the impact of pornography have been distributed to over 400,000 scholars, organizations and citizens.

The issues in this case directly affect the physical, psychological and emotional well being of children, parents and communities throughout the United States. Family Research Council, Inc. works through legislative assistance and public policy to preserve and protect the family and thus has particular knowledge about the harms of child pornography that will be helpful to the Court in this case.

SUMMARY OF ARGUMENT

The Child Protection Restoration and Penalties Enhancement Act of 1990, codified at 18 U.S.C. § 2257 ("the Act"), requires producers of material containing "actual sexually explicit conduct" to create and maintain records concerning the age and true identity of the "performers" depicted. Those who produce such material for commercial gain must affix a statement to the material that gives the location of the records maintained pursuant to the Act. The Act prohibits no speech, and nothing learned through the Act's requirements can be used in a subsequent obscenity or child pornography trial. The Act is designed simply to prevent producers of hard-core pornography from using children as "performers."

The Act serves a governmental interest of the highest priority -- protecting children from being used in hard-core pornography -- by placing reasonable restrictions on the "manner" in which material with "actual sexually

explicit conduct" is displayed. These minimal restrictions are narrowly tailored to serve that interest, and will in no way interfere with or "chill" important free speech rights.

ARGUMENT

Throughout their brief, Petitioners carefully avoid detailed discussion of the type of material regulated by the Act. Instead they euphemistically write about burdens on "expression that is fully protected by the First Amendment." (Petitioners' Brief at 7). In a revealing omission, nowhere in their argument do Petitioners bother to tell the Court what type of important, significant and "fully protected" depictions are affected by the Act. We thought we could help by quoting from the Act's definition of "actual sexually explicit conduct":

> (A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (B) bestiality; (C) masturbation; (D) sadistic or masochistic abuse.

18 U.S.C. §2256 (2)(A-D).

We're not talking about Leonardo da Vinci or Michelangelo here. We're talking about producers of hard-core pornography, who hire prostitutes to perform sex acts in front of a camera. That is the "important" and "artistic" speech Petitioners are so concerned about but never bother to define.[1]

Nothing in the mainstream media depicts "actual sexually explicit conduct" as defined by the statute.[2] Any

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[1] Particularly amusing is Petitioners' hand wringing over the Act's effect on "a significant genre of art: appropriationist artwork that incorporates images of actual sexually explicit conduct created by others." (Petitioners' brief at 6). No doubt many art critics would be perplexed by the contention that stealing someone else's photo of people having sex and using it in your own "art" is "a significant genre."

[2] Amici continue to believe that all of the Petitioners lack standing based on the allegations contained in their complaint. The district court and appeals court gave this issue cursory review, and the government appears to have abandoned it. Nevertheless, we believe none of the Petitioners demonstrated that they would be injured or even affected by the Act. They did demonstrate their concern over the issue, "but standing is not measured by the intensity of the litigant's interest or the fervor of his

material that contains "actual sexually explicit conduct," if

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advocacy." *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 486 (1982).

The hard-core pornography industry, which does produce material that will be regulated by this Act, is not represented in this lawsuit. That may be because "adult" video and magazine corporations are frequently shadowy organizations with documented ties to organized crime figures. See Final Report, Attorney General's Commission on Pornography (A.G.C.P.), Vol II at 1037 (July 1986). Unquestionably, as plaintiffs in a major lawsuit they would not be nearly as attractive as legitimate library organizations, periodicals distributors, artists and photographers. Further, unlike existing Petitioners, the adult magazine and video industry is notorious for its emphasis on youth, which often involves using post-pubescent teenage children in hard-core pornographic movies and photographs. The case of Traci Lords, who was molested in more than 100 hard-core pornographic movies before her 17th birthday, is not atypical. It is that type of case that this Act is designed to prevent.

Libraries, freedom to read organizations, legitimate periodical distributors, artists and photographers are not affected by this Act at all, yet they are the plaintiffs. The adult video and magazine industry, which will be regulated, is noticeably absent. We think it is a bad precedent to allow legitimate organizations with extreme First Amendment views to serve as "front groups" for illegitimate, organized-crime controlled enterprises that create illegal obscene material.

it is not in fact obscene and therefore unprotected by the First Amendment, will lie at the outer edge of what the First Amendment protects. This Court has indicated on several occasions that non-obscene, sexually explicit speech is simply not on the same plane of First Amendment protection as political discourse or other forms of speech. See e.g. *Barnes v. Glen Theatre*, 111 S.Ct. 2456 (1991) (nude dancing is "marginally" expressive conduct "within the outer perimeters of the First Amendment"); *Young v. American Mini-Theatres*, 427 U.S. 50 (1967) (plurality opinion) (society's interest in protecting sexual speech lesser than interest in protecting political speech; viewing "Specified Sexual Activities" is not a right Americans would be willing to go to war to preserve).

It is also worth noting that the definition of obscenity is in some respects broader than the definition of "actual sexually explicit conduct" contained in the Act. For matter to be obscene, it needs to meet the three-part test set

forth in *Miller v. California*, 413 U.S. 15 (1973): it must depict sex in a patently offensive way; be intended to appeal to the prurient interest; and lack serious value. But the sex depicted in obscene material need not be "actual sexually explicit conduct" -- simulated sexual activity can render material obscene if other parts of the test are met. Thus, the Act is limited to regulating only material that contains depictions that are the most explicit type of hard-core pornography under the test for obscenity, and obscenity is completely without protection of the First Amendment. The close relationship between material containing "actual sexually explicit conduct" and material that crosses the line into unprotected obscenity or child pornography should be considered when examining the claim that "self-censorship" will be caused by the Act's "chilling effect" on speech. As this Court stated in *Fort Wayne Books v. Indiana*, 489 U.S. 46 (1989), "[t]he mere assertion of some possible self-censorship resulting from a statute is not enough to render

an anti-obscenity law unconstitutional under our precedents." Or as the Ninth Circuit put it in upholding Arizona's stiff fines for obscenity violations:

> Whatever chill may arise from Arizona's felony fine system, properly understood, is attributable to the state's legitimate deterrent goal ... Those who conduct their affairs close to the boundary of proscribed activity necessarily incur some risks.

Polykoff v. Collins, 816 F.2d 1326, 1340 (9th Cir. 1987).

Anyone who is involved in disseminating material containing depictions of "actual sexually explicit conduct" is already walking the line between speech and illegal obscenity. They are also walking the line between speech and unprotected child pornography, in that the legality of the material turns solely on the age of the "performers." The Act merely requires that, if they choose to walk that line and disseminate such material, they keep records of the age of the "performers." That may actually assist them in avoiding violation of child pornography laws.

The "speech" regulated by the Act is deserving of

only marginal First Amendment protection to begin with, so this Court need not examine the burdens the Act imposes with heightened First Amendment scrutiny. To the extent the Act regulates speech, the requirement that producers keep certain records of employees, and that the location of those records be attached to the material, is a regulation of the "manner" of expression. To pass constitutional muster under a "time, place and manner" analysis, the Act must: 1) be content-neutral; 2) be narrowly tailored to serve a significant governmental interest; and 3) leave open ample alternative avenues of communication. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 298 n.5 (1984). The Act easily meets those requirements. As the D.C. Circuit concluded, it is not concerned with the content or message of any sexually explicit material. Instead, it is narrowly tailored to serve the government's compelling interest in protecting children from being used in hard-core pornography. And it does more than allow ample

alternative avenues of communication, it does not even interfere with the very avenue of communication it regulates.

Because it regulates conduct, the Act should be analyzed under the four-part *O'Brien* test for determining the constitutionality of regulations of conduct which have the incidental effect of burdening protected expression. The Act is not aimed at regulating speech but at conduct -- the hiring of performers to engage in "actual sexually explicit conduct" in front of cameras. Under *United States v. O'Brien*, 391 U.S. 367 (1967), a regulation is justified despite its impact on First Amendment interests if:

1) it is within the constitutional power of government;

2) it furthers an important or substantial governmental interest;

3) the governmental interest is unrelated to the suppression of free expression; and

4) the incidental restriction on First Amendment freedoms is not greater than is essential to

the furtherance of that interest.

The Act is manifestly within the power of the government, which requires employers to keep a host of other personnel records for purposes much less compelling than the protection of children from being used in hard-core pornography.

The protection of children from the abuse caused by their molestation in sexually explicit photos or films is a governmental interest of "surpassing importance." In *Ferber v. New York*, 458 U.S. 747 (1982), this Court held that child pornography, even though not obscene under the *Miller* standard, is outside the protection of the First Amendment. The Court supported its conclusion with a lengthy discussion of the harms to children when their bodies are used to sell pornography.

> It is evident beyond the need for elaboration that a State's interest in "safeguarding the physical and psychological well-being of a minor" is "compelling." "A democratic society rests, for its continuance, upon the

> healthy, well-rounded growth of young people into full maturity as citizens." ... The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.

Ferber, 458 U.S. at 756-57 (citations omitted). The Court went on to cite a number of studies supporting the legislative judgment that "the use of children as subjects of pornographic materials is harmful to the physiological, emotional and mental health of the child. That judgment, we think, easily passes muster under the First Amendment." 458 U.S. at 759.

The Court then discussed some of the particular horrors faced by children used in hard-core pornography, noting that "the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation." In a footnote the Court cited "one authority" who wrote that:

> [P]ornography poses an even greater threat to the child victim than does sexual abuse or prostitution. Because the child's actions are

> reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place. A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography.

Ferber, 458 U.S. 759, n.10.

The children sought to be protected here are post-pubescent children who look like adults. The record-keeping requirements contained in the Act are derived primarily from Recommendation 37 of the Attorney General's Commission on Pornography. See A.G.C.P. Vol. I at 618. The Commission found justification for the requirements after a careful study of the "performers" or "models" used in hard-core pornographic films and magazines:

> Perhaps the single most common feature of models is their relative, and in the vast majority of cases, absolute youth. As one law enforcement officer who has extensively investigated the production of commercial pornography told us, "they [the producers] are looking for models that look as young as possible. They may use an 18-year-old

> model and dress her up to look like she is 15." Female models appearing in "mainstream" commercial pornography appear rarely to be over thirty years old or even in their late twenties; indeed, most whose age we have been able to gauge began their careers in their late teens. Indeed, one former model who now works in the front office of an "adult" video company explained her decision to retire thus: "Good roles for women over nineteen years old have become few and far between." William Margold, a leading figure in the "adult" film industry, described it simply as "essentially an overage juvenile hall."

A.G.C.P. at 855-56 (citations omitted).

Given these factual findings, the Commission noted an increased demand for both child pornography and pseudo-child pornography, which uses young adults dressed like children. This frequently led to problems in enforcing the pre-1988 laws against child pornography:

> The growth of pseudo child pornography has made it increasingly difficult for law enforcement officers to ascertain whether an individual in a film or other visual depictions is a minor... experts and law enforcement officers have found it difficult to extend [full protection of child pornography laws]

> because in many instances, ascertaining the real ages of adolescent performers is impossible. By viewing a visual depiction, how does one decide if the performer is fourteen or eighteen, seventeen or twenty-one?

A.G.C.P. at 618, 620 (emphasis added).

The Commission found that child pornography laws were not being enforced effectively because the youthfulness of all performers in hard-core pornography made it difficult to determine whether minors were used in any particular film, video or magazine. Clearly, minors have been and are being used in the mainstream commercial pornography industry.[3] These findings of the Commission

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[3] For one well-publicized example, see *U.S. v. Kantor*, 677 F.Supp. 1421 (C.D. Cal. 1987), involving hard-core porn "superstar" Traci Lords, who made more than 100 films depicting actual sexual intercourse and numerous other sexual acts that were distributed internationally in pornographic outlets and video stores over the course of several years. In 1986, it was discovered that she was 17 years old, and that she had begun her hard-core career at age 15. Interestingly, several of those hard-core films trumpeted the fact that Lords was playing a "schoolgirl" role, highlighting the porn industry's desire to play up the

led directly to its recommendation that producers and distributors be required to keep records on performers.

The third prong of the *O'Brien* test is whether the governmental interest is unrelated to the suppression of free expression. There is no evidence in the legislative record that Congress intended by this legislation to do anything other than prevent children from being used in hard-core pornography.[4] Because child pornography is not free

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youth of its performers. More recently, the same scenario occurred involving another porn star, Alexandria Quinn, who made more than 60 hard-core videos before it was discovered that she was a child. Her later appearance on a TV news show was marked by remorse, tears, and shame -- the reactions of a teenager who is beginning to recognize that she has been used.

[4] This Court has upheld other governmental regulations as content-neutral even though they impacted sexually oriented speech businesses. See *Arcara v. Cloud Books*, 478 U.S. 697 (1986) (closure of "adult" bookstore based on illegal activity occurring on premises proper despite impact on presumptively protected speech); *Renton v. Playtime Theatres*, 475 U.S. 41 (1986) (adult use zoning ordinance regulating sexually oriented businesses constitutional because it is content-neutral; aimed at preventing blight, not at suppressing speech even though it

speech, and because nonobscene material is merely regulated and not prohibited by the Act, the recordkeeping provisions pass this part of the *O'Brien* test.

The final prong of the test is whether the incidental restrictions on speech are no greater than necessary to effectuate the government's purpose. In light of the government regulations governing the Act's implementation, it is clear the burdens imposed by the Act on marginally protected speech interests are minimal, and are essential to furthering the government's compelling interest in protecting children from being used in hard-core pornography.

The record-keeping requirements of the Act are not unduly burdensome to First Amendment free speech rights. A number of federal laws contain similar requirements, as noted in the Final Report of the Attorney General's

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incidentally impacts speech).

Commission on Pornography. "The proposed legislation would serve a recordkeeping purpose comparable to that found in environmental and similar statutes." A.G.C.P. at 621-22 (citing at n.469 "The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)).[5] The Commission in making this recommendation relied on testimony from a number of expert witnesses, including noted civil libertarians like Harvard Law School Professor Alan Dershowitz, a regular contributor to Penthouse magazine, who at the time of his testimony was representing Penthouse, now a plaintiff in this suit:

> My own personal view is that every magazine should be required to get consent forms of models who do participate in this kind of activity and I for one...would be in favor of legislation that would require that if photographs are taken in the United States of America of American people, that consent forms should be required. That, it seems to

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[5] 7 U.S.C. § 1361. See also 8 U.S.C. § 1324 (federal immigration law) and 26 U.S.C. § 4421 et seq. (Internal Revenue Code requirements for illegal wagering.)

> me, is not an issue in the law of pornography, it is an issue on the law of voluntariness and consent... I think consent is a very important part of freedom, and Commissioners, on this one I think you and I agree, we all want to increase volunteerism and decrease lack of consent, whether that be by models or purchasers of magazines.

Transcript of Hearing, A.G.C.P., Jan. 21-22 (1986) (emphasis added).

In *Buckley v. Valeo*, 424 U.S. 1 (1976), a number of candidates for political office, officeholders and political organizations challenged provision of the Federal Election Campaign Act of 1971 (F.E.C.A.), including its extensive disclosure requirements for campaign contributors. After a detailed discussion of the important First Amendment rights of speech and association implicated by the disclosure requirements, and an acknowledgement that those rights could be significantly impaired by the statute, this Court upheld the law as constitutional because it furthered important governmental interests. This Court ruled that "the

substantial public interest in disclosure identified by the legislative history of this Act outweighs the harm generally alleged." 424 U.S. at 72.

F.E.C.A. regulated speech at the core of protections provided by the First Amendment -- pure political speech, in the form of campaign contributions to political candidates. The disclosure requirements are substantially more burdensome to the free speech rights of political organizations than the record-keeping requirements of the Act are to producers and distributors of material depicting "actual sexually explicit conduct." After *Buckley*, it should be clear that these record-keeping requirements involving pornographic speech are a fortiori constitutional.

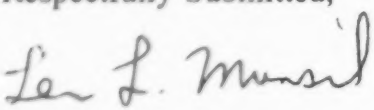
Anything short of the Act's requirement that producers of material that depicts people performing "actual sexually explicit conduct" keep identification and age records will not serve the compelling governmental interest of protecting children from use in hard-core pornography.

The Traci Lords and Alexandria Quinn cases, which together account for at least 160 videos sold in the mainstream adult market that turned out to be child pornography, prove that real children will be injured without a recordkeeping requirement. If this Act does not stand, real children will be sexually abused and exploited by pornographers who are all too willing to put profits before principle by using post-pubescent minor teenagers.

CONCLUSION

For all of the foregoing reasons, amici curiae National Family Legal Foundation, Focus on the Family, and Family Research Council, Inc. respectfully urge this court to deny the Petition for Writ of Certiorari.

Respectfully Submitted,



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APPENDIX "A"

U. S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

May 16, 1995

Len L. Munsil
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Re: ALA v. Reno
No. 94-1653

Dear Mr. Munsil:

As requested in your letter of May 2, 1995, I hereby consent to the filing of a brief amicus curiae in opposition to the petition for writ of certiorari in the above-styled case, by the National Family Legal Foundation, Focus on the Family and Family Research Council.

Sincerely,

Drew S. Days, III

Drew S. Days, III
Solicitor General

cc: William K. Suter, Esquire
Clerk
Supreme Court of the United States
Washington, D.C. 20543

BEST AVAILABLE COPY

I, Bruce J. Ennis, Jr., do hereby consent to the filing of an Amicus Curiae Brief in opposition to the Petition for Writ of Certiorari in *ALA v. Reno*, No. 94-1653, by the National Family Legal Foundation, Focus on the Family and Family Research Council.

5/8/95
Date

Bruce J. Ennis, Jr. /BJE
Bruce J. Ennis, Jr.
Counsel for Petitioners

I, Bruce J. Ennis, Jr., do not consent to the filing of an Amicus Curiae Brief in opposition to the Petition for Writ of Certiorari in *ALA v. Reno*, No. 94-1653, by the National Family Legal Foundation, Focus on the Family and Family Research Council.

Date

Bruce J. Ennis, Jr.
Counsel for Petitioners

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CERTIFICATE OF SERVICE

Two copies of the foregoing Brief Amici Curiae were deposited in the United States Mail, First Class, Postage Prepaid on this 26th day of May, 1995, to each of the following attorneys:

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